PD-0216&0217-21
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/2/2021 7:59 AM
Accepted 9/7/2021 12:15 PM
DEANA WILLIAMSON
CLERK

PD-0216-21 & PD-0217-21

In the Texas Court of Criminal Appeals

FILED
COURT OF CRIMINAL APPEALS
9/7/2021
DEANA WILLIAMSON, CLERK

Timothy Aaron Swinney
Petitioner-Appellant

v.

The State of Texas
Respondent-Appellee

From the Ninth Court of Appeals,
Cases 09-18-00474-CR & 09-18-00475-CR

Appealed from the 1-A Judicial District Court
in Newton County, Cases ND7248 & ND7289

The State's Brief

Courtney Ponthier
Newton County District Attorney
State Bar No. 24060741
110 Court Street, Room 121
P.O. Drawer 36
Newton, Texas 75966
(409) 379-8600
(409) 379-8603 (fax)
courtney.ponthier@
co.newton.tx.us

Brett Ordiway
Special Prosecutor
State Bar No. 24079086
8150 N. Central Expressway
Suite M1101
Dallas, Texas 75206
(214) 468-8100
(214) 468-8104 (fax)
brett@udashenanton.com

Counsel for Respondent the State

Table of Contents

Index of Authorities

Cases

Statutes

Statement of the Case

This is the rare case in which the record on direct appeal shows ineffective assistance of counsel. Applying the since-disavowed test announced in *Riley v. State*, 378 S.W.3d 453 (Tex. Crim. App. 2012), however, the court of appeals held that Appellant's trial counsel's performance, while deficient, was not prejudicial. *Swinney v. State*, No. 09-18-00474-CR, 2021 WL 261568, at *5-6 (Tex. App.—Beaumont Jan. 27, 2021); *see Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018) ("disavow[ing]" *Riley*). The court thus affirmed the district court's judgments and Appellant's eight- and two-year sentences on charges of aggravated assault with a deadly weapon. *Swinney*, 2021 WL 261568, at *1, 6.

Issues Presented (Restated)

1. Whether the court of appeals applied a disavowed prejudice standard.
2. Whether the record is developed sufficiently to show that Appellant's counsel's incorrect advice reasonably likely caused Appellant to waive his right to jury sentencing.

Statement of Facts

Appellant originally wished for the jury to assess his punishment if found guilty. But on the morning jury selection began, his attorney crossed out "jury" on his handwritten election and replaced it with "judge." CR7248 at 75[1]; CR7289 at 44; *see* RR4: 4.

On several occasions during Appellant's trial, his attorney made clear that he believed the court could sentence Appellant to probation. *See* RR4: 5, 8; RR6: 41-42; RR8: 10-12, 91-95. And the record reflects that probation's what Appellant really wanted. It was his counteroffer to the State's plea offer. RR4: 4. Before the punishment phase began, counsel advised the court that Appellant would not appeal if sentenced to probation. RR7: 41-42. And counsel told the court, "We're simply asking for probation, ten years['] probation." RR8: 12.

Summary of the Argument

A criminal defendant is denied his Sixth Amendment right to counsel if there is a reasonable probability that his attorney's deficient performance "caused [him] to waive a judicial proceeding that he was otherwise entitled

[1] "CR7248 at 75" refers to page 75 of the clerk's record of case ND7248. All other references to both clerk's records are in this format. For example, "CR7289 at 44" refers to page 44 of the clerk's record of case ND7289.

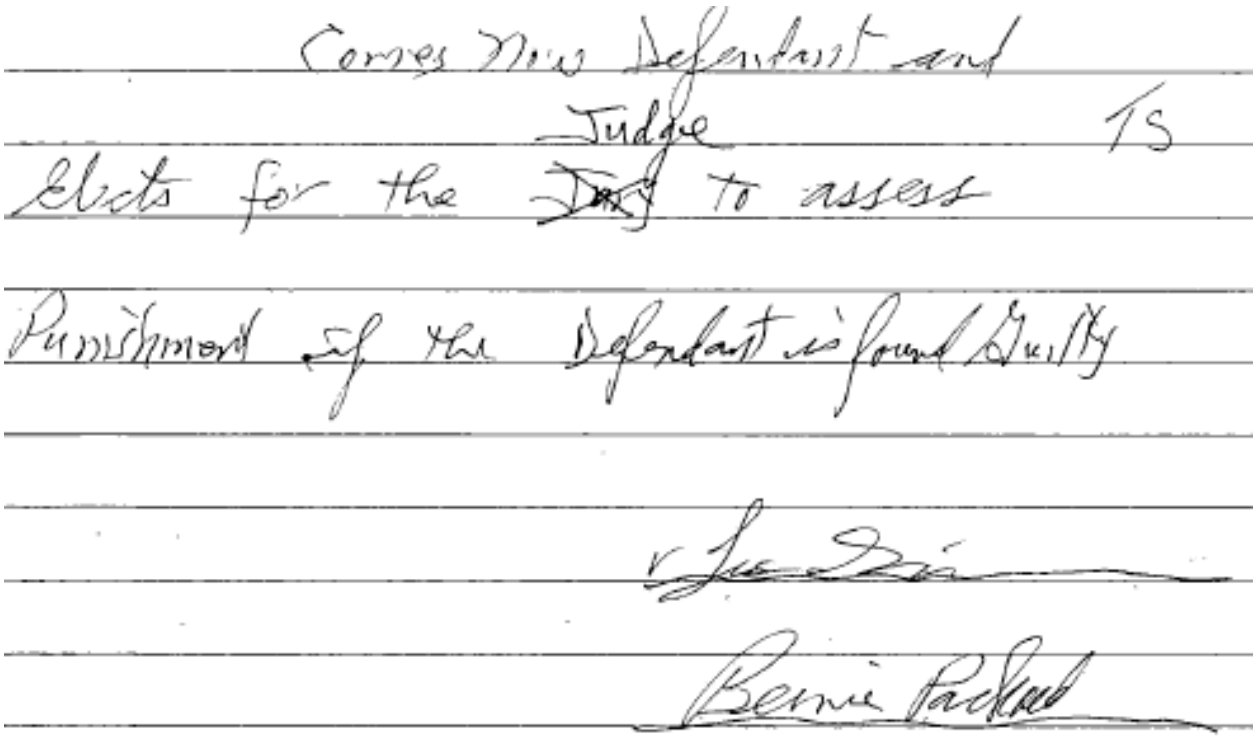
to have." *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). Here, the trial transcript demonstrates that but for Appellant's trial counsel's incorrect advice that the court could sentence Appellant to probation, it's reasonably likely Appellant would not have waived his statutory right to jury sentencing.

Argument

The State largely agrees with Appellant. To demonstrate prejudice from his counsel's incorrect advice that the court could sentence him to probation, Appellant had to show it's reasonably likely the reason he waived his statutory right to jury sentencing. *Miller v. State*, 548 S.W.3d 497, 502 (Tex. Crim. App. 2018); *see* Tex. Code Crim. Proc. art. 37.07 § 2(b). The court of appeals erred in applying the more burdensome test announced in *Riley v. State*, 378 S.W.3d 453 (Tex. Crim. App. 2012), under which a defendant also must show that "the results of the proceeding [not had] would have been different had [the defendant's] attorney correctly informed him of the law." *Id.* at 458; *see Swinney v. State*, No. 09-18-00474-CR, 2021 WL 261568, at *5-6 (Tex. App.—Beaumont Jan. 27, 2021) (applying *Riley*'s test and concluding Appellant "cannot meet his burden to show the

outcome in his trial would have been different had he been correctly advised"); *Miller*, 548 S.W.3d at 498 ("disavow[ing]" *Riley*).

The court of appeals further erred in concluding Appellant "cannot show on this record that the advice his attorney gave him was the sole reason he chose to go to the trial court for punishment…" *Swinney*, 2021 WL 261568, at *6. The record shows that Appellant originally wished for the jury to assess his punishment. On the morning jury selection began, however, counsel crossed out "jury" on his handwritten election and replaced it with "judge":



CR7248 at 75; CR7289 at 44; *see* RR4: 4 ("And you have initialed here where—because we did make a change and so now you're asking that the judge—if you're found guilty, you're asking that the judge set punishment?"). Probation clearly was Appellant's aim. It was his counteroffer to the State's plea offer. RR4: 4. Before the punishment phase began, Appellant's counsel advised the court that he would not appeal if sentenced to probation. RR7: 41-42. And counsel told the court, "We're simply asking for probation, ten years[']probation." RR8: 12.

As the State conceded in the court of appeals, the appellate record thus supports that it's at least reasonably likely counsel's incorrect advice caused Appellant to waive his right to jury sentencing. Appellant therefore has shown that his counsel's deficient performance was prejudicial, and he is entitled to relief. *Miller*, 548 S.W.3d at 502; *see also Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Prayer

The State prays this Court reverse the district court's judgments as to Appellant's sentences and remands these cases for new punishment hearings.

Respectfully submitted,

Courtney Ponthier
Newton County District Attorney
State Bar No. 24060741
110 Court Street, Room 121
P.O. Drawer 36
Newton, Texas 75966
(409) 379-8600
(409) 379-8603 (fax)
courtney.ponthier@co.newton.tx.us

/s/ Brett Ordiway
Brett Ordiway
Special Prosecutor
State Bar No. 24079086
8150 N. Central Expressway
Suite M1101
Dallas, Texas 75206
(214) 468-8100
(214) 468-8104 (fax)
brett@udashenanton.com

Counsel for the State

Certificate of Service

I hereby certify that, concurrent with this document's electronic filing, it will be electronically served to Tonya Rolland, counsel for Appellant, at tonya@rollandlaw.com, and the State Prosecuting Attorney at information@spa.texas.gov.

/s/ Brett Ordiway
Brett Ordiway

Certificate of Compliance

Relying on the word count of the computer program used to prepare the document, I hereby certify that this document contains 716 words (excluding the parts of the document exempted by Tex. R. App. P. 9.4(i)(1)), complying with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B).

/s/ Brett Ordiway
Brett Ordiway

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Brett Ordiway on behalf of Brett Ordiway
Bar No. 24079086
brett@udashenanton.com
Envelope ID: 56895267
Status as of 9/7/2021 12:16 PM CST

Associated Case Party: Newton County District Attorney's Office

Name	BarNumber	Email	TimestampSubmitted	Status
State ProsecutingAttorney		information@spa.texas.gov	9/2/2021 7:59:39 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Courtney Ponthier		Courtney.Ponthier@co.newton.tx.us	9/2/2021 7:59:39 AM	SENT
Brett Ordiway		brett@udashenanton.com	9/2/2021 7:59:39 AM	SENT